GUIDE TO THE BAGLEY-KEENE OPEN MEETING ACT

Adapted from the Attorney General's *Handy Guide to The Bagley-Keene Act* [1] and prepared for the Off-Highway Motor Vehicle Recreation Commission

This guide is intended to be a reference guide, highlighting the major provisions related to meetings and communications concerning the OHMVR Commission. This document is no substitute for consulting the actual language of the Bagley-Keene Open Meeting Act (Act) and the court cases and administrative opinions that interpret it.

INTRODUCTION

The Act, as set forth in Government Code sections 11120-111321, covers all state boards and commissions. Generally, it requires these bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session.

PURPOSE OF THE ACT

Operating under the requirements of the Act can sometimes be frustrating for both board members and staff. This results from the lack of efficiency built into the Act and the unnatural communication patterns brought about by compliance with its rules.

If efficiency were the top priority, the Legislature would create a department and then permit the department head to make decisions. However, when the Legislature creates a multimember board, it makes a different value judgment. Rather than striving strictly for efficiency, it concludes that there is a higher value to having a group of individuals with a variety of experiences, backgrounds and viewpoints come together to develop a consensus. Consensus is developed through debate, deliberation and give and take. This process can sometimes take a long time and is very different in character than the individual-decision-maker model.

Although some individual decision-makers follow a consensus-building model in the way that they make decisions, they're not required to do so. When the Legislature creates a multimember body, it is mandating that the government go through this consensus building process.

When the Legislature enacted the Bagley-Keene Act, it imposed still another value judgment on the governmental process. In effect, the Legislature said that when a body sits down to develop its consensus, there needs to be a seat at the table reserved for the public. (§ 11120.) By reserving this place for the public, the Legislature has provided the public with the ability to monitor and participate in the decision-making process. If the body were permitted to meet in secret, the public's role in the decision-making process would be negated. Therefore, absent a specific reason to keep the public out of

the meeting, the public should be allowed to monitor and participate in the decision-making process.

If one accepts the philosophy behind the creation of a multimember body and the reservation of a seat at the table for the public, many of the particular rules that exist in the Bagley-Keene Act become much easier to accept and understand. Simply put, some efficiency is sacrificed for the benefits of greater public participation in government.

BODIES COVERED BY THE ACT: General Rule

The general rule for determining whether a body is covered by the Act involves a two part test (§ 11121(a)): First, the Act covers multimember bodies. A multimember body is two or more people. Examples of multimember bodies are: state boards, commissions, committees, panels, and councils. Second, the body must be created by statute or required by law to conduct official meetings. If a body is created by statute, it is covered by the Act regardless of whether it is decision-making or advisory.

Advisory Bodies

The Act governs two types of advisory bodies: (1) those advisory bodies created by the Legislature and (2) those advisory bodies having three or more members that are created by formal action of another body. (§11121(c).) If an advisory body created by formal action of another body has only two members, it is not covered by the Bagley-Keene Act. Accordingly, that body can do its business without worrying about the notice and open meeting requirements of the Act. However, if it consists of three people, then it would qualify as an advisory committee subject to the requirements of the Act. When a body authorizes or directs an individual to create a new body, that body is deemed to have been created by formal action of the parent body even if the individual makes all decisions regarding composition of the committee. The same result would apply where the individual states an intention to create an advisory body but seeks approval or ratification of that decision by the body. Finally, the body will probably be deemed to have acted by formal action whenever the chair of the body, acting in his or her official capacity, creates an advisory committee. Ultimately, unless the advisory committee is created by staff or an individual board member, independent of the body's authorization or desires, it probably should be viewed as having been created by formal action of the body.

WHAT IS A MEETING?

A meeting occurs when a quorum of a body convenes, either serially or all together, in one place, to address issues under the body's jurisdiction. (§ 11122.5.) A meeting includes situations in which the body is merely receiving information. To the extent that a body receives information under circumstances where the public is deprived of the opportunity to monitor the information provided, and either agree with it or challenge it, the open-meeting process is deficient.

Typically, issues concerning the definition of a meeting arise in the context of informal gatherings such as study sessions or pre-meeting get-togethers. The study session historically arises from the body's desire to study a subject prior to its placement on the body's agenda. However, if a quorum is involved, the study session should be treated as a meeting under the Act. With respect to pre-meeting briefings, the Attorney General's (AG) office opined that staff briefings of the a half hour before the noticed meeting to discuss the items that would appear on the meeting agenda were themselves meetings subject to open meeting laws [2]. To the extent that a briefing is desirable, the AG's office recommends a briefing paper be prepared which would then be available to the members of the body, as well as to the public.

Serial Meetings

The Act expressly prohibits the use of direct communication, personal intermediaries, or technological devices that are employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body outside of an open meeting. (§ 11122.5(b).) Typically, a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members.

For example, a chain of communications involving contact from member A to member B who then communicates with member C would constitute a serial meeting in the case of a five-person body. Similarly, when a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred. In addition, a serial meeting occurs when intermediaries for commission members have a meeting to discuss issues. For example, when a representative of member A meets with representatives of members B and C to discuss an agenda item, the members have conducted a serial meeting through their representatives acting as intermediaries.

In the Stockton Newspapers case, the court concluded that a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting [3]. In that case, the attorney individually polled the members of the body for their approval on a real estate transaction. The court concluded that even though the meeting was conducted in a serial fashion, it nevertheless was a meeting for the purposes of the Act.

An executive officer may receive spontaneous input from commission members on the agenda or on any other topic. But problems arise if there are systematic communications through which a quorum of the body acquires information or engages in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between commission members and the staff.

Although there are no cases directly on point, if an executive officer receives the same question on substantive matters addressed in an upcoming agenda from a quorum of the body, this office recommends that a memorandum addressing these issues be provided to the body and the public so they will receive the same information.

This office has opined that under the Brown Act (the counterpart to the Bagley-Keene Act which is applicable to local government bodies) that a majority of the board members of a local public agency may not e-mail each other to discuss current topics related to the body's jurisdiction even if the e-mails are also sent to the secretary and chairperson of the agency, posted on the agency's Internet website, and made available in printed form at the next public meeting of the board.[4]

The prohibition applies only to communications employed by a quorum to develop a collective concurrence concerning action to be taken by the body. Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of state bodies should avoid serial communications of a substantive nature that involve a quorum of the body.

In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of commission members. In these situations, part of the deliberative process by which information is received and processed, mulled over and discussed, is occurring without participation of the public.

In essence, the serial-meeting provisions mean that what the body can not do as a group it can not do through serial communications by a quorum of its members.

Social Gatherings

The Act exempts purely social situations from its coverage. (§ 11122.5(c)(5).) However, this construction is based on the premise that matters under the body's jurisdiction will not be discussed or considered at the social occasion. It may be useful to remind board members to avoid "shop talk" at the social event.

Teleconference Meetings

The Act provides for audio or audio and visual teleconference meetings for the benefit of the public and the body. (§ 11123.) When a teleconference meeting is held, each site from which a member of the body participates must be accessible to the public. [Hence, a member cannot participate from his or her car, using a car phone or from his or her home, unless the home is open to the public for the duration of the meeting.] All proceedings must be audible and votes must be taken by roll call. All other provisions of

the Act also apply to teleconference meetings. For these reasons, it is recommended that a properly equipped and accessible public building be utilized for teleconference meetings. This section does not prevent the body from providing additional locations from which the public may observe the proceedings or address the state body by electronic means.

NOTICE AND AGENDA REQUIREMENTS

The notice and agenda provisions require bodies to send the notice of its meetings to persons who have requested it. In addition, at least ten days prior to the meeting, bodies must prepare an agenda of all items to be discussed or acted upon at the meeting. The agenda needs to contain a brief description of each item to be transacted or discussed at the meeting, which as a general rule need not exceed 20 words in length. The agenda items should be drafted to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item. Bodies should not label topics as “discussion” or “action” items unless they intend to be bound by such descriptions. Bodies should not schedule items for consideration at particular times, unless they assure that the items will not be considered prior to the appointed time. The notice and agenda requirements apply to both open and closed meetings. There is a tendency to think that agendas need not be prepared for closed session items because the public cannot attend. But the public’s ability to monitor closed sessions directly depends upon the agenda requirement which tells the public what is going to be discussed.

REGULAR MEETINGS

A regular meeting requires a 10-day notice. This simply means that at least 10 days prior to the meeting, notice of the meeting must be given along with an agenda that sufficiently describes the items of business to be transacted or discussed. (§§ 11125(a), 11125(b).) In two special situations, items may be added to the agenda within the 10-day notice period, provided that they are added and notice is given no later than 48 hours prior to the meeting. (§ 11125.) The first such situation is where the body concludes that the topic it wishes to add would qualify for an emergency meeting as defined in the Act. (§ 11125.3(a)(1).) The second situation is where there is a need for immediate action and the need for action came to the attention of the body after the agenda was mailed in accordance with the 10-day notice requirement. (§ 11125.3(a)(2).) This second situation requires a two-thirds vote or a unanimous vote if two-thirds of the members are not present.

Changes made to the agenda under this section must be delivered to the members of the body and to national wires services at least 48 hours before the meeting and must be posted on the Internet as soon as practicable.

SPECIAL MEETINGS

A few years ago, special meetings were added to the Act to provide relief to agencies that, due to the occurrence of unforeseen events, had a need to meet on short notice and were hamstrung by the Act's 10-day notice requirement. (§ 11125.4.) The special meeting requires that notice be provided at least 48 hours before the meeting to the members of the body and all national wire services, along with posting on the Internet. The purposes for which a body can call a special meeting are quite limited. Examples include pending litigation, legislation, licensing matters and certain personnel actions. At the commencement of the special meeting, the body is required to make a finding that the 10-day notice requirement would impose a substantial hardship on the body or that immediate action is required to protect the public interest and must provide a factual basis for the finding. The finding must be adopted by two-thirds vote and must contain articulable facts that support it. If all of these requirements are not followed, then the body can not convene the special meeting and the meeting must be adjourned.

EMERGENCY MEETINGS

The Act provides for emergency meetings in rare instances when there exists a crippling disaster or a work stoppage that would severely impair public health and safety. (§ 11125.5.) An emergency meeting requires a one-hour notice to the media and must be held in open session. The Act also sets forth a variety of other technical procedural requirements that must be satisfied.

PUBLIC PARTICIPATION

Since one of the purposes of the Act is to protect and serve the interests of the general public to monitor and participate in meetings of state bodies, bodies covered by the Act are prohibited from imposing any conditions on attendance at a meeting. (§ 11124.)

To ensure public participation, the Legislature expressly afforded an opportunity to the public to speak or otherwise participate at meetings, either before or during the consideration of each agenda item. (§11125.7.) The Legislature also provided that at any meeting the body can elect to consider comments from the public on any matter under the body's jurisdiction. And while the body cannot act on any matter not included on the agenda, it can schedule issues raised by the public for consideration at future meetings.

CLOSED SESSIONS

Although, as a general rule, all items placed on an agenda must be addressed in open session, the Legislature has allowed closed sessions in very limited circumstances. Closed sessions may be held legally only if the body complies with certain procedural requirements. (§ 11126.3) As part of the required general procedures, the closed session must be listed on the meeting agenda and properly noticed. (§ 11125(b).) Prior

to convening into closed session, the body must publically announce those issues that will be considered in closed session. (§ 11126.3.) This can be done by a reference to the item as properly listed on the agenda. In addition, the agenda should cite the statutory authority or provision of the Act which authorizes the particular closed session. (§11125(b).) After the closed session has been completed, the body is required to reconvene in public. (§ 11126.3(f).) However, the body is required to make a report only where the body makes a decision to hire or fire an individual. (§ 11125.2.) Bodies under the Bagley-Keene Act are required to keep minutes of their closed sessions. (§ 11126.1.) Under the Act, these minutes are confidential, and are disclosable only to the board itself or to a reviewing court. Courts have narrowly construed the Act's closed-session exceptions. For example, voting by secret ballot at an open-meeting is considered to be an improper closed session. Furthermore, closed sessions may be improperly convened if they are attended by persons other than those directly involved in the closed session as part of their official duties.

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1. California Attorney General's Office: *A Handy Attorney General's Handy Guide to The Bagley-Keene Act,* 2004.

2. 42 Ops.Cal.Atty.Gen. 61 (1963); see also 32 Ops.Cal.Atty.Gen. 240 (1958).

3. Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal.App.3d 95, 105. See also, 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820, 828-829 (1980).

4. Cal.Atty.Gen., Indexed Letter, No. IL 00-906 (February 20, 2001).